



# City of Carmel

## **Carmel Advisory Board of Zoning Appeals Special Meeting Wednesday, August 11, 2004**

The special meeting of the Carmel Board of Zoning Appeals met at 7:00 PM on Wednesday, August 11, 2004 in the Council Chambers of City Hall, Carmel, Indiana. The meeting opened with the Pledge of Allegiance.

Members in attendance were Leo Dierckman, James Hawkins, Earlene Plavchak, Madeleine Torres and Charles Weinkauff, thereby establishing a quorum. Jon Dobosiewicz, Angie Butler and Mike Hollibaugh represented the Department of Community Services. John Molitor, Legal Counsel, was also present.

Mr. Molitor gave the Legal Report. He reported that he has updates on pending litigation and would like to meet with the Board in Executive Session before the next regularly scheduled meeting on Monday, August 23, 2004.

Mr. Dobosiewicz gave the Department Report. There were several additional pieces of information in front of the Board this evening. He wanted the Board to acknowledge receipt of the request to table this evening's hearing dated July 29 from Thomas Yedlick and another received by the Department July 29<sup>th</sup> filed by Philip Thrasher, an attorney for a group of remonstrators. Today the Department received a request from Philip Thrasher to suspend the Rules of Procedure with regard to the amount of time allotted pursuant to the Board's Rules for the Public Hearing process. Mr. Dobosiewicz suggested the Board discuss that request for suspension of the rules prior to the start of the Public Hearing.

Because of the complexity of the petition, Mr. Weinkauff asked the Board for a motion to suspend the rules surrounding Article 7 Conduct of Hearing Section 13 procedure for the petitioner, as well as the remonstrators, so that all issues may be heard. The Chair, and the Board in its entirety, will limit redundancy as it relates to both sides. It is the intent to somewhat limit the time of this meeting. It is highly unlikely that the Board will be able to reach a conclusion this evening. As a result, at some time tonight they will more than likely continue this meeting to another time.

Mr. Dierckman moved to suspend the rules of Article 7 Conduct of Hearing Section 13 procedure. Mr. Hawkins seconded the motion. Discussion followed regarding the time limit and how much time would be needed by the petitioner, the remonstrators and the Department. Each group would need about 45 minutes to one hour. The petitioner and all the remonstrators will each be allowed one hour and any rebuttals may need to be heard at the continued meeting date.

Mr. Dierckman withdrew his motion and Mr. Hawkins withdrew his second.

Mr. Dierckman moved to suspend the rules surrounding Article 7 Conduct of Hearing Section 13 procedure; this meeting will end at 10:00 PM and be continued to another date. The motion was seconded by Mr. Hawkins and **APPROVED 5-0.**

## **H. Public Hearing:**

### **1h. Martin Marietta Materials - Mueller Property South**

The petitioner seeks special use approval for a sand and gravel extraction operation.

**Docket No. 04040024 SU** Chapter 5.02.02 special use in the S-1 zone

The site is located at the southwest corner of the intersection of East 106<sup>th</sup> Street and Hazel Dell Parkway. The site is zoned S-1/Residence - Low Density.

Filed by John Tiberi of Martin Marietta Materials, Inc.

Present for the Petitioner: Zeff Weiss, 3400 One American Square, Indianapolis, IN, attorney for Martin Marietta Materials, Inc. Also present were Jon Tiberi, Regional Vice President and Dan Hoskins, Regional Operations Service Manager with Martin Marietta, and Wayne Phears, counsel. Mr. Weiss asked about the two pending motions by the remonstrators.

Mr. Weinkauff stated that the Board had received those requests to table and they have been entered as a matter of public record.

Mr. Weiss gave a brief history of the petition that was filed December 13, 2002 with a first TAC meeting February 13, 2003. Since that time there have been many meetings with the Department of Community Services and various Departments of the City of Carmel to address the technical details. They believe they have responded to each of the substantive issues that were raised in connection with the TAC process. Many of the requests that were made by the Department and also issues raised by the remonstrators in this process are outside the Ordinance scheme. The first substantive meeting was held with the remonstrators last week. There are five petitions the Board may hear about, but only one of them is before the Board today. That one is for sand and gravel to be mined on what is known as the Mueller South property on the south side of 106<sup>th</sup> Street just immediately west of Hazel Dell Road. This property is zoned S-1 and mining is permitted in the S-1 zoning district as a Special Use. That has been challenged by the remonstrators, but the Staff believes it is appropriate. He discussed the Board's jurisdiction over Special Use applications and that under the Ordinance, they are generally considered favorably by the Board. Many issues brought to the Board's attention tonight by the Staff and the remonstrators are outside the scope of the Ordinance and are not to be considered tonight. They believe the reports from the Department of Community Services and its outside consultant, Spectra, and also the Departments within the City of Carmel, such as Utilities and Engineering, will support this petition. They will voluntarily address the other issues that they believe are outside the scope of the Ordinance, but will give some clarity for issues that might be of some concern. He quoted from three decisions of the Indiana Court of Appeals that state the framework in which they come tonight: 1. Town of Merrillville Board of Zoning Appeals v. Public Storage, Inc.; 2. Boffo v. The Boone County Board of Zoning Appeals; 3. Town of Network Towers, LLC v. Board of Zoning Appeals of LaPorte County, Indiana. He passed out supporting material in affidavit form for the record.

Discussion off microphone concerning sworn statements.

Wayne Phears, swore himself in. He discussed conditional uses and special uses. Mark Williams and Laura Barra from Skelly & Loy were pointed out as the ones who did the engineering and noise study that were previously submitted. Dr. David Buss, with a Ph.D. in hydrogeology, has worked with Jack Wittman, Morris Hensley and John Duffy regarding groundwater. This petition has been through an extensive review in the TAC process. The parcel is 97 acres, of which approximately 55-57 acres is

actually going to be mined. The rest will be in buffers and not be mined. He showed maps and discussed the general layout of the mines in the area, including the area south of 96<sup>th</sup> Street. The setback will be approximately 330 feet. The Ordinance requires 300 feet setbacks in the S-1 district. The application proposes to use mechanized equipment, normal earthmoving equipment, to extract sand and gravel, take it out to 106<sup>th</sup> Street, go north to the existing plant and process it. No blasting of any kind is proposed in this application. It is not being removed by dreg, because that area is not wet enough. They estimate three to five years of mining in the 26 feet depth of material. It is next to the open pit mine. The face of the open pit mine will eventually be co-terminus with the southern Mueller property line. He feels it is stunning that the remonstrators suggest single family residential houses should be built in this S-1 district overlooking the existing pit. The petitioner has agreed to a landscaping plan for the berm with the Carmel Urban Forester. He discussed the Carmel Sand operation. This operation has gone on while neighborhoods grew up around it. It is closer to the Kingswood neighborhood and has more going on than anything proposed in this application. The application to move this sand operation to the east side of Hazel Dell Parkway was denied by the Board and is in litigation at this time. The noise study was discussed. Decibels with plant not operating are 47-57 and with plant operating the decibels vary according to location in Kingswood and relative to the berm. With a model of what was going to be used, there was no noise impact above Blue Woods Creek and none north of 106<sup>th</sup> Street. He shared a property value study prepared by Michael Lady. Kingswood is at or near the top of comparable neighborhoods. He also showed property being developed near the main mine, near the quarry. Even the main mine and the sand and gravel operation have more intensive mining operations and have not hurt property values. Next he discussed hydrology. They have been cooperative with the City regarding the hydrology issues of pumping, water flow, water quality and water quantity information from their site. Fifty percent of Carmel City Well Field #4 capacity comes from the Martin Marietta ponds which recharge the well field as part of the natural process. The water has been sampled and tested and is good. The property in this application is bounded on two sides by mines, one side by a four-lane highway and the fourth side by the Mueller North property. This is a compatible use for this piece of property. He requested that submittals that were made be incorporated into the record.

Members of the public were invited to speak in favor of the petition; no one appeared.

Remonstrance:

Phil Thrasher, 151 N. Delaware Street, Suite 1900, Indianapolis, In, an attorney representing the Kingswood Home Owners Association and various individuals. He was assisted by Jeff Bellamy, one of his associates and various expert witnesses. The assessed value of everything Martin Marietta owns in Clay Township, not including Mueller, is \$6,683,500. Whereas the assessed value of Kingswood, Wood Creek and Sycamore Farms is \$98,000,000 and they have more at risk. The applicant has divided their overall application into little subordinate parts. The fact of the matter is that they want to remove that piece of the Mueller property and take it away. They want to do it first by scraping off the trees and the overburden and then removing what layer of sand and gravel they find and then digging down through a blasting process to get down to the floor which is about 215 feet lower. They also have a third application on file to literally go underground. They just have not asked the DOCS to bring the other two applications forward at this time. It seems obvious that once they have scraped the sand and gravel off the top of the limestone shelf, they are going to ask for permission to blast away. If they had a straight-up application with what they want to do, the remonstrators could confront the issue directly. The neighborhoods will be impacted by nuisances of noise, prospects of home damage, personal damage and shock waves or air blasts from the open pit blasting that will surely ensue at Mueller South. Hazel Dell Parkway, 106<sup>th</sup> Street, Carmelot Park and sections of the neighborhoods will be within range of fly rock damage from blasting.

Discussion off microphone by Zeff Weiss regarding objections.

John Gasper, (résumé distributed) President and Senior Engineer for EnviRESTORE Engineering, specializing in reclamation of abandoned mines and water, with 20 years experience, located at 7002 Graham Road Suite 106, Indianapolis, IN. The sand and gravel application calls for mining at a dry setting at road level and going down to whatever depth the sand and gravel resources go, 25-60 feet. From a noise point of view, the noise at this location will not be dampened by water, but will be generated by scraping activity, loading and dumping, trucks positioning themselves to the loading equipment, backup beepers, etc. If the noise level is 50 decibels in one place and 50 more are added, then it is not 50 decibels in all locations.

More discussion and objections off microphone. Mr. Weinkauff stated that the Public Hearing portion would be left open in the continuance to allow both the remonstrators and the petitioner to speak regarding any new information that may have been presented this evening or may occur between this meeting and the next.

Mr. Thrasher discussed blasting. Once the sand and gravel is taken off, in the remonstrator's opinion, there will be no choice but to have a limestone blasting operation.

Mr. Weiss objected to the testimony regarding blasting as irrelevant and inappropriate. He stated that Mr. Thrasher was incorrect. According to the submittals and reclamation plan, it seems that there is no limestone removed beneath the sand and gravel. He wanted the record to show a continuing objection to matters that are outside the scope of the Board's review.

Mr. Weinkauff stated that the objection was so noted.

Mr. Gasper discussed blasting. It is difficult to perform blasting in a highly populated area, affecting the public safety and evaluating whether the better good is being served by letting it happen. The Mine Safety and Health Administration of the Department of Labor catalogs all sorts of accidents related to the mining industry. Some focus on the concept called fly rock. Pictures were shown of a recent fatality caused by fly rock. There is clearly an opportunity for people to be put in jeopardy. Fly rocks are caused by a number of situations in the mining environment, of which he presented examples.

Mr. Thrasher discussed underground water. He stated that apparently unbeknownst to a lot of folks, Martin Marietta has become part of the water company, but may not suffer the same regulations as Carmel Utilities.

John Mundell, (résumé distributed) President and Senior Environmental Consultant for Mundell & Associates, located at 429 E. Vermont Street, Suite 200, Indianapolis, IN. He is a professional engineer and licensed professional geologist with 25 years experience in the area of environmental ground water and water resources consultant. He outlined some of his previous work. He shared pictures of the mine and quarry locations. The capture zone from the City's wells pull water from the ponds that the quarry waters are discharged into. The wells pull the water from the ponds to the wells. This capture zone has now defined the wellhead protection zone for the City. The previous wellhead protection zone for this well was shaped differently because this phenomenon was not understood. Under current conditions, around 50% of the water that was being pulled into the wells comes from these ponds that came from water from the mine. This is a very unique situation in the State of Indiana and he knows of no others like

this one. The water from this wellhead is distributed in this quadrant of Carmel, not all over the City. Carmel can choose to use this as the wellhead protection zone or Carmel can choose to draw lines differently. They could easily draw the protection zone to include the mine completely. With the proposed Mueller expansion, 80% of the water that passes through the mine goes into these ponds and ends up in the Carmel water supply. This is a highly vulnerable situation.

Mr. Thrasher covered dust next. Under M-1 zoning, fugitive dust is forbidden. In the S-1 district there is no such regulation.

Mr. Gasper stated that dust at this particular site will have two origins: blasting and working in dry sand and gravel excavation area.

Mr. Thrasher emphasized the question of the definition of mineral extraction, stockpiling, dirt removal and so forth in S-1 as compared to M-1. Mineral extraction is listed in S-1, mining is not. He read from the Purpose and Intent of the Zoning Ordinance regarding public safety and future use of the land affected by the Ordinance and the Purpose and Intent of S-1. He then compared it to the Purpose and Intent of M-1 which is an intensive industrial district that includes mineral extraction, storage, etc.

Mr. Weiss objected to what Mr. Thrasher was reading. He stated that Mr. Thrasher was reading from minimum usage, not special uses.

Mr. Thrasher continued that Martin Marietta should really be requesting a zoning change to M-1, not a special use variance in an S-1 district. The State of Indiana has not regulated mining, so the Board is being asked to regulate and manage the mining operation. He asked that the Board reject the petition because it cannot be managed without a long list of commitments or an Ordinance. On June 24, 2004, DOCS issued a letter stating that all Martin Marietta properties in Clay Township are legal conforming uses, as of May 17, 2002. If that is the case, then under nonconforming use law, those uses cannot change without the Board's consent. Traffic is proposed from Mueller South onto 106<sup>th</sup> Street. They are draining their water onto another piece of property which was not intended for that use originally. Then they are taking the water across the pit area, that water will be grabbed and run over to the lakes on Gray Road. The water system takes the water from the pit area, which will include Mueller South, into a pipe pumped underneath Gray Road over to those lakes and they percolate down into the water system. He feels the application should show these lakes as part of the special use application. He also alleges that Carmel Sand is an illegal nonconforming use. They propose to use Carmel Sand for their processing. If Carmel Sand cannot be used, the remonstrators do not want its use to inadvertently be authorized through approval of this petition. He also discussed the ownership of the Mueller property. Mueller owns the dirt and Martin Marietta owns a lease. There has been no disclosure as to who owns the mineral rights and how those mineral rights might be used to grab the aggregate out of the dirt. The remonstrators recommend that the Mueller's should join in the petitions, reclamations, bonding, etc.

Mr. Mundell discussed the final reclamation use of the area. There has not been any analysis detailing whether the quarry will be able to fill with water and become a reservoir.

Mr. Thrasher stated that many plans had been named by Martin Marietta for reclamation, but wondered which one would really be the case. He stated that in a summary of Martin Marietta's application there is a reference that the burden of proof was on the remonstrators to prove something. The case cited, Boffo v. The Boone County Board of Zoning Appeals, states the opposite. The burden of proof is on the petitioner

to meet those five criteria. If they miss any one of those five, the Board must deny. He concluded by saying that the DOCS has done yeoman work in answering questions and providing help.

Mr. Molitor stated that the Department had some out-of-state consultants that may or may not be available for continuation of this hearing. He suggested that the Board may want to move directly to the Department Report and hold off on the additional public comment until continuation of the hearing.

Mr. Dobosiewicz said that the Department would make every effort to have the consultants available at the next meeting.

Mr. Weinkauff stated that the Board would want to hear the witnesses, the remonstrators and the petitioner. All would have ample opportunity to speak at the continuance.

The Board took a five minute recess.

Mr. Dobosiewicz stated that John Duffy and his consultant and Greg Sovas from Spectra Environmental would make their presentations and then he would provide a summary of some of the information that was received and the Department's recommendation.

John Duffy, Utility Director, City of Carmel, Water and Wastewater Utility. When the Mueller South application came in December 2002, he and his staff subsequently gave Martin Marietta a letter asking for a list of information and required certain things. That information was slow in coming, because the petitioner had to gather it. He did receive considerable information five or six months ago which led to his department working closely with their hydrologist to find out what was going on. They came up with the new wellhead protection area that was not there in 1993 or 1994. The bottom line for the Utility is that it has existed that way for some time and they did not know it. They monitor their wells as required by the State. The water passes through the treatment process and is tested daily and it goes out. He feels that now that they know about it, it is manageable and they can monitor it and make it even better. From a wellhead protection standpoint, they do not have the ability to ask Martin Marietta not to do this.

Dr. Jack Wittman, President and Chief Hydrologist for Wittman Hydro Planning Associates, WHPA, 320 W. Eighth Street, Bloomington, IN. He has a Ph.D. in Environmental Science and has been working twenty years in ground water and surface water hydrology. He stated some of his relevant work history. His company works specifically with municipal water utilities and most of what they do is related to well field development or well field protection. He made clarifications on two of his company's reports that had been used earlier in the hearing. One of their findings was that there would be a reduction in the capacity at the well field at Plant #4 by approximately 15%. He shared a picture of the area. This assumes that the original drawdown was at the lowest possible water level in the well, which may or may not be true. It may be possible to pump at a lower operating water level, but they don't have data. The other point is the capture zone. The water is coming from the north pit of these two ponds. The actual water that is draining into that north pond is coming from Blue Woods Creek that is to the north and west through a residential area. The water levels in that pond are generally higher than the pond to the south because a lot more water is coming in. The pond to the south gets its water directly from the Martin Marietta operation. These two ponds are connected with a culvert. Most of the water for Plant #4 comes from Blue Woods Creek. One statement that was made in a summary of the petition was that without the ponds 50% of the water would not be there. That is not the case. It would take a separate piece of work to figure out what would be the case if the ponds were not there. Another important point is that the water level in the ponds

is elevated by the Martin Marietta operation. It balloons up the water in the water table in that area. That additional water does in fact add to the aquifer in that region. That water is not coming from one place, but two places. It is coming from the Martin Marietta operation on the south and Blue Woods Creek on the north. Both are adding to the water that eventually finds its way through the aquifer to the water field. There hasn't been any observed problem with the water quality in those wells. However, our recommendation to the Utility is that there be enhanced monitoring of the water going into these bodies immediately. The ground water should also be monitored between these two ponds and the well fields.

Mr. Wittman can come back for the continuance, so questions can be asked at that time.

Greg Sovas, Spectra Environmental Group, Latham, NY. He is Vice President, Governmental Affairs. Spectra Environmental has been working in Carmel on mining issues assisting the Department of Community Services and in helping to write a mining ordinance. The response to the February 2003 TAC questions was received in March 2004. Responses to the April 2004 TAC were received in July 2004. They have seen Dr. Wittman's reports, written remonstrance of Kingswood, and the summary application. There has been a lot of give and take throughout this process with the applicant. They now have documents that represent a legitimate mining plan and reclamation plan.

Jason Kappel, Senior Hydro Geologist, Spectra Environmental Group, Latham, NY. Spectra took several of the noise models provided by Skelly & Loy for Martin Marietta and input those into an independent program. In general the results support their findings and are consistent. Spectra has additional comments and questions to submit to DOCS regarding the noise level.

Mr. Sovas stated that with all the new information that has been received, they would like to continue their review of these documents and work with the BZA and DOCS on reaching a decision on the application. He stated they will make every effort to attend the continuance.

Mr. Kappel stated he could provide his comments in writing before the next meeting, in case he could not come back. Some of his comments have to do with equipment used for the models for the noise tests.

Mr. Dobosiewicz gave the Department Report. He pointed out the index that amends and adds to the Department Report and illustrates all the volumes of information that have been received for consideration by the Board. The Department will return to the Board prior to the next meeting, in writing, the Department outline of support information. Proposed findings would provide the Board a basis from which to discuss their own findings prior to final action on the request and would include a list of commitments from the petitioner, specifically addressing Chapter 21.3.25. It is likely that the Department will generate a list of conditions that they would ask the Board to include in any consideration that would be favorable to the petition. They would ask the petitioner to consider incorporating those into the petition as commitments, as opposed to the Board adopting an approval subject to conditions. They would address the basis for Board review which is contained within the written report. An outline of the Ordinance with regard to special uses within the S-1 district was provided. The Department requested digital and hard copies of the three PowerPoint presentations that were made. The Department ask to keep the exhibits used by Mr. Thrasher and Dr. Wittman for the record. They can be used at a future meeting. Mr. Dobosiewicz acknowledged receipt of the following so that they could be entered into the record: résumé for John A. Mundell, information obtained off a website for the U. S. Department of Labor, a résumé for John H. Gasper, submitted by the petitioner were affidavits of John Tiberi and David Buss, a document entitled Objections by Martin Marietta Materials, Inc., a letter from the Department of Natural Resources

dated November 24, 2003, and an affidavit of Michael C. Lady which attached to a document entitled Neighborhood Analysis Kingswood Subdivision, Hamilton County, Carmel, Indiana. The Department recommends the Board continue the Public Hearing at a date to be decided by the Board and acknowledged the fact that additional members of the public need an opportunity to comment.

Mr. Weinkauff stated that the Public Hearing portion of the petition will remain open at the continuance to allow both the remonstrators and petitioner to speak regarding any new information that may have been presented this evening or may occur between this meeting and the next.

The continuance date was discussed. It was decided to continue this Public Hearing for **Docket No. 04040024 SU** to the regular scheduled meeting of the BZA on September 27, 2004. The regular part of the meeting will begin at 5:00 PM, with this continuance starting no earlier than 6:30 PM. Mr. Dierckman moved to change the time of the next regular BZA meeting to 5:00 PM on Monday, September 27, 2004. The motion was seconded by Mrs. Torres and **APPROVED 5-0.**

**I. Old Business**

There was no Old Business.

**J. New Business**

There was no New Business.

**K. Adjourn**

Mr. Dierckman moved to adjourn. The motion was seconded by Mrs. Torres and **APPROVED 5-0.**

The meeting was adjourned at 10:00 PM.

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Charles Weinkauff, President

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Connie Tingley, Secretary